BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY J. DEKAT Claimant	)	
VS.	)	
DURHAM D & M, LLC Respondent	)	Docket No. 1,042,760
AND	)	
OLD REPUBLIC INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 17, 2012, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on January 9, 2013. Matthew R. Bergmann, of Topeka, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was permanently, totally disabled.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent contends that claimant is not permanently, totally disabled. Respondent asks the Board to adopt the findings of Dr. Paul Stein and Dr. Lyle Baade, both of whom found claimant had no functional impairment and no work restrictions. In addition, respondent asks the Board to adopt the finding of Dr. Stein that claimant is able to work.

Claimant contends the evidence proves he is permanently, totally disabled and asks the Board to affirm the ALJ's Award. In the event the Board finds claimant is not permanently, totally disabled, claimant asserts he is entitled to a 75 percent work disability based on a 100 percent wage loss and a 50 percent task loss.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?

2. Is respondent entitled to a credit for overpayment of temporary total disability compensation?

FINDINGS OF FACT

Claimant had been a mechanic for approximately 30 years. He was hired by respondent in 2005 as a lead mechanic. He had two mechanics who worked under him, but he also did some of the heaviest work. Respondent has about 100 buses, and he was the lead mechanic for repairs on them all. On July 31, 2008, claimant was injured when he was trying to close a gate to prevent a pickup from leaving respondent's premises after the pickup's driver had been seen filling the pickup with diesel fuel from respondent's fuel pumps. Claimant was unable to get the gate closed in time, and the pickup went through the gate, knocking the gate into claimant and throwing claimant onto the ground.

Claimant testified he was knocked unconscious, and when he woke up he was lying on the ground on his back. He had pain in the back of his head, his neck, and all down his right side. He had abrasions on his face and had suffered a head injury. He was taken to the emergency room by ambulance. Claimant was taken off work a few days and then went back to work in the office performing light duty tasks.

After claimant's treatment at the emergency room, he was treated by Dr. Donald Mead, who referred him to a neurologist, Dr. Wade Welch. Dr. Welch referred claimant to Dr. Gary McKnight. As well as lower back pain and neck pain, claimant suffered from migraine headaches, dizziness, tinnitus, photosensitivity, and depression.

Claimant continued to work for respondent at light duty until September 2008. He was taken off work by Dr. Mead as of October 3, 2008. Claimant was terminated by respondent on August 1, 2010, and has not had any gainful employment since that date. Claimant had a commercial driver's license at the time of his accident, but he lost that because of dizziness and spells of passing out. His driver's license was taken away for awhile after the accident but has since been reinstated. However, claimant only drives around the small town of Hoyt, Kansas, if no one else can drive him. His wife or daughter usually drives him to appointments.

Claimant testified he spends most of his day sitting in a dark room, trying to sleep. He only gets about three hours of sleep per night. Sometimes, if it is not too sunny, he will walk to the mailbox to get his mail, but when he gets back to the house he is generally dizzy with a bad headache. Claimant has migraines two or three times a week, a constant roaring/ringing in his ears, dizziness that causes imbalance, a speech impediment that comes and goes, and constant nausea from the medication. He has severe lower back pain and neck discomfort. Claimant had never had migraines, vertigo or tinnitus before the accident.

Dr. Kathryn Hedges evaluated claimant on May 4, 2009, at the request of the ALJ. Dr. Hedges believed claimant suffered from posttraumatic headaches and dizziness as well as balance issues that occurred as a result of the July 31, 2008, accident. She also indicated claimant suffered from anxiety that seemed to contribute to his tremor, intermittent chest pain, and possible panic attacks. Dr. Hedges said this seemed to be a posttraumatic stress disorder. She believed claimant had not received adequate treatment and needed to regularly see a neurologist or other physician to treat his headaches. Dr. Hedges opined that claimant's shaking arm was related to his anxiety. She believed claimant's hand numbness was related to bilateral carpal tunnel syndrome and was unrelated to his accident. Dr. Hedges said if claimant continued to have symptoms of benign positional vertigo, he should have a trial of canalith repositioning maneuver with Dr. McKnight. She recommended further evaluation of claimant's neck pain. It was Dr. Hedges' opinion that claimant not drive and that he should not be working.

Dr. Paul Stein, a board certified neurosurgeon, was authorized by respondent as claimant's treating physician. He examined claimant on July 2, 2009. Claimant complained to Dr. Stein of multiple problems from the accident, including tightness and discomfort in his neck extending to the left trapezius muscle and headaches accompanied by photosensitivity, some slurring of his speech, and nausea. Claimant reported two episodes of blacking out with a headache. Claimant had constant ringing in his ears and constant lower back pain. He had numbness and tingling in his hands, right more than left. Claimant said he often fell and used a cane for balance. He reported short term memory loss and mass confusion.

Following review of claimant's medical records, taking claimant's history, and performing a physical examination, Dr. Stein stated he had concerns regarding the number of complaints and amount of disability generated by the injury. His physical examination of claimant showed evidence of symptom magnification. Dr. Stein noted that no definitive vestibular dysfunction was found in claimant. Relative to claimant's cognitive functions and emotional disturbance, Dr. Stein opined the amount of disturbance appeared to be out of proportion to the injury. He said there did not appear to be much evidence regarding traumatic brain dysfunction. Claimant appeared to show evidence of anxiety and depression, but Dr. Stein questioned whether this was a direct result of the accident. Dr. Stein, therefore, requested a full neuropsychological battery by Dr. Lyle Baade and MRIs of claimant's lower back and neck.

Dr. Stein issued a supplemental report on August 14, 2009, after he had reviewed the requested MRI scans of the cervical and lumbar spine. Dr. Stein said claimant had mild, multilevel degenerative disease in the cervical spine, mild central disk protrusion at C4-5, and some foraminal narrowing, all of which were consistent with age. There was nothing acute Dr. Stein could determine that resulted from a specific injury. The MRI of the lower back showed multilevel degenerative disease and mild right-sided disk bulging at L4-5 but no true rupture. X-rays of the lower back showed a slight forward subluxation of L4 on L5. Dr. Stein ordered physical therapy for claimant's neck and lower back.

After Dr. Stein received the report of Dr. Baade, he issued his final report on March 31, 2010. Dr. Baade had not found any evidence of persistent or significant cognitive difficulty or traumatic brain dysfunction, and Dr. Stein indicated he had no recommendation for further treatment, other than he suggested consideration be given to an epidural steroid injection and more physical therapy. Dr. Stein felt claimant was at maximum medical improvement (MMI) as of March 31, 2010.

Based on the AMA *Guides*,[1] Dr. Stein would place claimant in either DRE Lumbosacral Category I or II. With claimant's specific injury and some restriction of motion and complaints of tenderness, Dr. Stein would have ordinarily placed claimant in Category II with a 5 percent impairment. But because claimant showed so much symptom magnification, Dr. Stein said claimant could be in Category I with 0 percent impairment. For the neck, Dr. Stein said it was the same. Dr. Stein does not believe one can provide an impairment rating based on purely subjective complaints and if one did not believe claimant's subjective complaints, claimant would have no impairment relative to the July 31, 2008, accident. Dr. Stein placed no specific restrictions on claimant. He believed claimant was capable of working but said he wanted a functional capacity evaluation before making a final determination relative to claimant's ability to work.

Lyle Baade, Ph.D., is a board certified clinical neuropsychologist. His evaluation of claimant was done in September and November 2009 and consisted of a clinical interview, a review of records, and administration of a number of neuropsychological tests.

Dr. Baade said claimant's speech was slow and he had some incorrect grammar, but was otherwise normal. Claimant was able to comprehend and follow instructions. He tended to underestimate his abilities somewhat. Claimant's emotional reactions were congruent to what he was speaking about. In terms of the cognitive tests performed on claimant, Dr. Baade said there were problems in terms of validity. Claimant failed a couple of validity measures on the Word Memory Test. There were differences in memory tests that were difficult to explain. Claimant's immediate memory was worse than his delayed memory score.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Baade asserted that the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2) showed claimant was not trying to feign or exaggerate severe psychiatric symptoms, but he did have a marked elevation on the Fake Bad Scale (FBS), which was developed to detect exaggeration or feigning of physical and cognitive symptoms. Claimant's FBS score was high enough that Dr. Baade considered the profile invalid and uninterpretable. And when the MMPI-2 test is invalid, the Millon Clinical Multiaxial Inventory, Third Edition (MCMI-3) scores are not interpreted because the MCMI-3 test has weaker validity scales than the MMPI-2.

Dr. Baade opined that any head injury claimant may have received on July 31, 2008, was mild. Responding to Dr. Hedges' diagnosis, Dr. Baade said the nature of claimant's accident raises posttraumatic stress syndrome as a possibility, but he did not see anything in the medical records to support that diagnosis. Dr. Baade made no diagnoses in the emotional area because of the invalid personality tests. Also, the MMPI-2 supplied Dr. Baade with some evidence claimant was exaggerating at least some of his claims. Dr. Baade did not believe claimant's condition warranted permanent work restrictions from a neuropsychological standpoint.

Dr. Zhengyu Hu is a board certified physiatrist and pain management specialist. He became claimant's authorized treating physician and first saw claimant on May 11, 2010. In his physical examination, he found claimant had tenderness on palpation of his cervical paravertebral region and lumbar paravertebral region on both side. Neurologically, claimant was intact. Dr. Hu believed claimant's neck pain might be due to facet problems, the headaches were greater occipital neuralgia, and the low back pain was due to facet problems. Dr. Hu scheduled claimant for facet blocks in claimant's cervical spine, which were done on May 18, 2010. Dr. Hu saw claimant again on May 25, and claimant reported he had significant improvement for a couple of days but the pain returned. Claimant said his back pain was worse than his neck pain. An EMG study was done on June 1, 2010, which was normal.

Dr. Hu saw claimant again on July 20, 2010. Dr. Hu was told by claimant that his back was still more of a problem than his neck or headaches. Dr. Hu diagnosed claimant with lumbar facet joint dysfunction and recommended claimant have right facet joint injections. The right lumbar facet injection was done on July 27, and Dr. Hu saw claimant again on August 3. Claimant reported the injection had helped his back greatly. Dr. Hu felt claimant had reached MMI on August 3, 2010.

Dr. Hu's final diagnosis was cervical facet dysfunction on both sides, lumbar facet joint dysfunction on both sides, right worse than left, and greater occipital neuralgia. Using the AMA *Guides*, Dr. Hu rated claimant as having a 2.5 percent whole body impairment for his cervical spine, a 2.5 percent whole body impairment for his lumbar spine, and a 2.5 percent impairment for his minor head injury. Claimant's impairments combined to a 7.5 percent whole person impairment.

Dr. Hu placed a permanent work restriction on claimant that he lift no more than 15 pounds. He reviewed a task list prepared by Steve Benjamin. Of the 55 unduplicated tasks on the list, Dr. Hu opined claimant would be unable to perform 26 for a 47 percent task loss.

Dr. P. Brent Koprivica, a board certified independent medical examiner, examined claimant on May 24, 2011, at the request of claimant's attorney. Claimant gave Dr. Koprivica a history of his accident and medical treatment, and Dr. Koprivica also reviewed claimant's medical records. Claimant reported to Dr. Koprivica that his low back pain was worse than his cervical pain. Claimant complained of tinnitus and vertigo. During Dr. Koprivica's physical examination, he noticed claimant had intermittent tremors.

In examining claimant's neck, Dr. Koprivica said claimant was neurologically intact in his upper extremities but had severe neck region pain with shoulder motion testing. Dr. Koprivica said claimant not only had dysfunction in his neck but also had dysfunction of both shoulder girdles. Claimant also had mild-to-moderate loss of range of motion in his neck. Claimant had moderate deficit of motion in lumbar flexion and severe deficit of motion in lumbar extension. Claimant had mild deficits in lateral flexion. Dr. Koprivica said claimant fulfilled the validity criterion, which told Dr. Koprivica claimant's deficits of motion were physically based.

Dr. Koprivica opined the accident of July 31, 2008, was the direct and proximate cause for claimant's objective impairments based on traumatic brain injury, chronic cervical thoracic strain/sprain, and low back pain from aggravating injury to multi-level lumbar spondylosis. Dr. Koprivica said claimant's lumbar spondylosis pre-dated the accident but had been an asymptomatic condition until aggravated by the injury. Dr. Koprivica said claimant is going to require ongoing monitoring of his medications as well as some psychological evaluation and treatment.

Using the AMA *Guides*, Dr. Koprivica rated claimant as having a 10 percent whole person impairment for his traumatic brain injury. For the cervical region, Dr. Koprivica placed claimant in DRE Cervicothoracic Category II for a 5 percent whole person impairment. For the lumbar region, Dr. Koprivica used the Range of Motion Model and found claimant had a 9 percent impairment for lumbar multi-level disease, a 7 percent impairment for loss of true lumbar extension, a 5 percent impairment for loss of lumbar flexion, a 1 percent impairment for loss of lateral flexion, and a 13 percent impairment for the separate loss of lumbar motion. Using the *Guides*' Combined Values Chart, the combined range of motion lumbar ratings resulted in an overall whole person impairment rating of 21 percent for the lumbar impairment. Using the Range of Motion Model as a differentiator, the closest DRE category of percentage of impairment is Category IV, which assigns a 20 percent impairment. Therefore, Dr. Koprivica rated claimant as having a 20 percent whole person impairment for claimant's lumbar spine. Combining all claimant's whole person impairments, Dr. Koprivica rated claimant as having a total 32 percent whole person impairment.

Dr. Koprivica acknowledged claimant had no herniated disk or spondylolisthesis in his lumbar spine. He had no loss of motion integrity. Claimant has some degenerative conditions, mild to moderate arthritis, and has severe subjective complaints. Dr. Koprivica agreed if he did nothing other than look at claimant's diagnoses, he would have to place claimant in DRE Category II because claimant does not have radiculopathy, loss of motion segment integrity, or a combination of the two. Dr. Koprivica did not palpate any muscle spasms in claimant's low back but said with most chronic conditions, he would not see a spasm. Claimant had no loss of lordosis. Dr. Koprivica agreed claimant's 20 percent impairment for his lumbar spine is based on claimant's subjective complaints and subjective active range of motion results.

Dr. Koprivica stated:

> . . . the nature of his injuries are of the type that he could have fully recovered from them. And that's a true statement. So, the question is what do you rely on. But if I said we can't listen to anything he says, headache's subjective, dizziness is subjective, tenitis [*sic*] is subjective, neck–pain in the neck and back is subjective, the motion measurements have a subjective component, you exclude all that, then you couldn't assign impairment, I would agree with that.[2]

Dr. Koprivica recommended claimant only occasionally lift and carry. At a maximum, he recommended claimant limit himself to 20 pounds resistance for lifting and carrying. Claimant should also avoid repetitive or sustained activities above shoulder girdle level, overhead lifting, frequent or constant bending at the waist, pushing, pulling, twisting, and sustained or awkward postures of the lumbar spine and cervical spine. Claimant should also avoid activities where whole body vibration or jarring are likely, climbing tasks, and frequent or constant squatting, crawling or kneeling. Dr. Koprivica also recommended claimant not work at heights because of his dizziness issues.

Dr. Koprivica believed that practically and realistically, claimant could not access the open labor market. The severity of his restrictions are so extreme no ordinary employer would be able to employ him on a sustained basis. Claimant's headaches are unpredictable and so incapacitating he cannot function. Claimant could not work as a mechanic with his restrictions on bending, postures of his head and neck, and being limited to light physical work. Dr. Koprivica reviewed a task list prepared by Mike Dreiling and opined that of the 20 tasks on the list, claimant was unable to perform 10 for a 50 percent task loss.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on August 16, 2011, at the request of claimant's attorney. Mr. Dreiling prepared a list of 20 unduplicated tasks claimant had performed in the 15-year period before the accident.

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[2] Koprivica Depo. at 86.

Claimant quit school when he was a freshman in high school and never went back or got a GED. He obtained some certifications in the mechanic areas. He has no typing ability. Claimant was 47 years old and was receiving Social Security disability benefits at the time of the interview. Mr. Dreiling noted the majority of claimant's jobs involved physically-oriented work. Mr. Dreiling opined that based on claimant's description of his ongoing medical problems and taking into consideration his educational background and work experience, claimant is essentially and realistically unemployable in the open labor market.

Mr. Dreiling acknowledged that his list did not include some tasks that Steve Benjamin included in his list. The additional tasks included that claimant swept the shop and dusted floors, took inventory, trained mechanics, attended crew safety and management meetings, or monitored/supervised children on the bus, used a push mower to trim around objects, operated a loader to cover graves and fix roads, drew and maintained plot maps, sold plots, and oversaw grave digging and vault installation. Mr. Dreiling did not believe those extra jobs would expand the possibilities of jobs claimant could perform in the open labor market.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant by telephone on March 6, 2012, at the request of respondent. He prepared a list of 55 unduplicated tasks claimant performed in the 15-year period before his accident. Mr. Benjamin opined, utilizing the work restrictions of Dr. Hu, that claimant could return to work. Mr. Benjamin suggested claimant would be able to perform the tasks involved in small parts bench assembly, hand packager, van driver, security guard, and telephone solicitor. If claimant returned to work, his average weekly wage would be approximately $290. Mr. Benjamin, however, had not seen claimant and did not have a chance to assess his physical demeanor.

Mr. Benjamin opined that using Dr. Koprivica's restrictions, claimant would be unable to re-enter the open labor market and would have a 100 percent wage loss. At the time of the interview, claimant was not working and had a 100 percent wage loss. Mr. Benjamin was not asked to provide any job placement or job search analysis for claimant.

At some point after the accident, claimant began to complain of numbness and tingling in both hands, and he was diagnosed with bilateral carpal tunnel treatment. After a preliminary hearing, the ALJ ordered respondent to provide treatment for claimant's carpal tunnel condition. Claimant was treated by Dr. Lynn Ketchum and had carpal tunnel release surgeries on both hands. Dr. Ketchum was not deposed, and none of his reports were made a part of the record. On December 1, 2011, claimant filed an Amended Application for Hearing, claiming a series of accidents commencing July 31, 2008, and continuing up to and including claimant's last day of work, claiming injuries from being struck by a motor vehicle and from his regular job duties.

Dr. Hu said it would be hard to relate claimant's wrist condition to the accident unless claimant landed on his wrists with the wrists extended. Dr. Hu said he did not have enough evidence to say claimant's work activities after the accident might have aggravated a preexisting carpal tunnel condition. Nevertheless, Dr. Hu assigned claimant a 3 percent whole person impairment to each wrist.

Dr. Koprivica said claimant had objectively proven abnormalities for carpal tunnel syndrome, mild to moderate severity. Claimant had undergone carpal tunnel release surgery, and when Dr. Koprivica examined claimant, he found claimant had significant strength deficits in both hands. Dr. Koprivica associated claimant's carpal tunnel syndrome with claimant's activities as a mechanic. But he did not associate the condition with claimant's accident of July 31, 2008. Dr. Koprivica said it was possible claimant's accident could have traumatized the wrist area and triggered the development of symptoms, but the prevailing reason why claimant had carpal tunnel syndrome was his hand use as a mechanic. Dr. Koprivica also opined that claimant's ongoing activities as a mechanic after the accident could further contribute to his preexisting cumulative carpal tunnel condition, resulting in developing symptoms. In relation to claimant's carpal tunnel syndrome, Dr. Koprivica recommended claimant avoid repetitive hand tasks, including repetitive pinching or grasping; repetitive wrist flexion and extension; repetitive ulnar deviation of the wrist, or exposure of his upper extremities to vibration. For claimant's bilateral carpal tunnel syndromes, Dr. Koprivica rated claimant as having a combined whole person impairment of 23 percent. Dr. Koprivica said combining the carpal tunnel impairments with the whole body impairments for claimant's head, neck and lower back injuries would be 47 percent.

In the Award, the ALJ found claimant had not proven by a preponderance of the evidence that claimant's bilateral carpal tunnel syndrome was related to the work accident and awarded no benefits for that condition. There was no appeal of that finding by either party.

PRINCIPLES OF LAW and ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[3] The test is not

[3] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[4] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[5]

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[4] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[5] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

1. Carpal Tunnel Syndrome

Dr. Kathryn Hedges, a court-appointed medical examiner, reported to the ALJ that claimant's carpal tunnel syndrome was not related to the work accident. Dr. Koprivica testified that while the carpal tunnel may be related to claimant's work activities, he could not relate the condition to the July 31, 2008, traumatic injury. Dr. Koprivica stated it was his belief claimant returned to work for respondent after the accident until he was terminated.

At the regular hearing, claimant testified that even though he had restrictions and was supposed to stay in the office and work on the computer, that did not happen. He went on to say he continued to perform his "full lead mechanic" duties.[6] In a discovery deposition taken February 19, 2009, claimant testified the last time he "turned a wrench would have been probably July 30th," 2008.[7] He emphasized his comment by stating, "I haven't turned a wrench since then."[8] At a preliminary hearing held September 8, 2010, claimant testified he had not engaged in any type of repetitive use of the upper extremities after July 31, 2008. Claimant's testimony at the regular hearing is inconsistent with his prior testimony and found to be duplicitous.

The Board finds claimant is not entitled to compensation for carpal tunnel syndrome. Any payments made by respondent for medical treatment related to carpal tunnel syndrome shall be considered by the Board as an overpayment.

2. Functional Impairment

Three opinions were provided regarding the extent of functional impairment experienced by claimant. Dr. Koprivica assessed a 10 percent whole person impairment for claimant's traumatic brain injury, 5 percent for the cervical region, and 20 percent for his lumbar spine impairment. Dr. Koprivica combined the impairments to arrive at a 32 percent whole person impairment. However, Dr. Koprivica stated:

> . . . the nature of his injuries are of the type that he could have fully recovered from them. And that's a true statement. So, the question is what do you rely on. But if I said we can't listen to anything he says, headache's subjective, dizziness is subjective, tenitis [*sic*] is subjective, neck-pain in the neck and back is subjective,

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[6] Dekat Depo. at 37.

[7] *Id.* at 21.

[8] *Id.*

> the motion measurements have a subjective component, you exclude all that, then you couldn't assign impairment, I would agree with that. [9]

It appears from this statement that Dr. Koprivica's rating relies on claimant's veracity.

Dr. Stein, who was authorized to provide treatment to claimant, testified the highest percentage of impairment he would find for claimant would be 5 percent for the cervical spine and 5 percent for the lumbar spine. Dr. Stein testified he agreed with Dr. Koprivica that if one disbelieved claimant's subjective complaints, claimant would have no impairment relative to the July 31, 2008, accident.

Dr. Baade performed neuropsychological tests on claimant and found no evidence of continued cognitive deficits. The MMPI-2 supplied Dr. Baade with some evidence claimant was exaggerating his claims. It was Dr. Baade's opinion that claimant was exaggerating at least some of his complaints. Based upon claimant's inability to verify his subjective complaints and his factual inaccuracies regarding his job duties after the accident, the Board finds the ratings provided by Dr. Koprivica and Dr. Stein are to be afforded no weight.

Dr. Hu, who at the time of his deposition continued to treat claimant, rated claimant as having a 2.5 percent whole body impairment for his cervical spine, a 2.5 percent whole body impairment for his lumbar spine, and a 2.5 percent impairment for his minor head injury, resulting in a combined whole body impairment of 7.5 percent. Dr. Hu's opinions regarding the extent of permanent impairment were placed into the record without objection. More significantly, Dr. Hu provided his opinion of permanent impairment without any contingency as to the veracity or clinical verification of claimant's symptoms. As such, the Board accepts the rating of Dr. Hu related to claimant's neck, back and head injuries.

3. Permanent Total Disability

The ALJ found claimant was permanently and totally disabled and awarded compensation accordingly. The primary issue that will be addressed in this opinion is whether claimant is entitled to permanent partial disability or permanent total disability. Three medical doctors and one neuropsychologist testified in this case. Two of the medical doctors were authorized to provide medical treatment. Dr. Stein testified he thought claimant could work. Dr. Hu, the primary treating physician, placed only one restriction on claimant's ability to work, which was that claimant should not lift more than 15 pounds.

Mike Dreiling, vocational expert, testified that due to claimant's education, age and background, there was no work available at any exertion level claimant could perform.

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[9] Koprivica Depo. at 86.

Mr. Dreiling testified he did not consider Dr. Hu's permanent restrictions in arriving at the conclusion that claimant was unemployable. Steve Benjamin, another vocational expert, testified claimant could perform the tasks involved in five different jobs within Dr. Hu's restrictions. The Board finds claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

4. Work Disability Disability

a. Wage loss

The unrebutted evidence in the record supports a finding that claimant is currently unemployed and earns no wages. Notwithstanding evidence that claimant is employable, the Kansas Supreme Court has stated: "K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability." [10] The Board finds claimant experiences a 100 percent wage loss.

b. Task Loss

Claimant used Dr. Koprivica to establish task loss. Dr. Koprivica testified that based upon his review of the task list prepared by Mike Dreiling, claimant's vocational expert, claimant was unable to perform 10 of the 20 listed tasks. In his testimony, Mr. Dreiling admitted he did not have an accurate work history to determine the correct number of tasks. For example, he did not know claimant used a push mower, operated a front loader and performed some light duty tasks, like attending management meetings and supervising children on the bus. Mr. Dreiling stated the inclusion of these tasks would not affect his opinion regarding the employability of the claimant. Even so, the Board finds the task list prepared by Mr. Dreiling to be inaccurate for the purpose of proving claimant's task loss.

Dr. Hu reviewed the task assessment prepared by Mr. Benjamin. Dr. Hu testified claimant could no longer perform 26 of the 55 tasks listed in Mr. Benjamin's report. Dr. Hu's testimony was accepted, and Mr. Benjamin's task report was admitted into the record without objection. No rebutting evidence was proffered by either party. Based upon Dr. Hu's testimony, the Board finds that claimant experienced a 47 percent task loss.

5. Overpayment of Temporary Total Disability

The key to determining whether an overpayment of temporary total disability has been made lies in determining when claimant reached maximum medical improvement. There is no definition of maximum medical improvement in the Kansas Workers Compensation Act. Sources outside of this state have defined the date of maximum

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[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 610, 214 P.3d 676 (2009).

medical improvement as the date after which further recovery from, or lasting improvement to, an injury or disease can no longer be anticipated, based upon reasonable medical probability.[11]

The Kansas Court of Appeals has found that it is "generally held that where it is reasonably probable that a worker's disability will continue for an indefinite or indeterminate period of time, the disability is considered permanent in nature."[12] The *AMA Guides* define permanent impairment as one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.[13]

The only persuasive evidence on the record showing when claimant reached maximum medical improvement was provided by Dr. Hu. Dr. Hu stated in his report of August 3, 2010, that no further treatment was needed for claimant's neck and back pain. Claimant returned to Dr. Hu on February 22 and August 9, 2011, only for the purpose of obtaining refills of medication needed for pain, which is merely palliative medical treatment. The Board finds claimant reached maximum medical improvement on August 3, 2010.

CONCLUSION

Based upon the foregoing, the Board finds:

1. Claimant's carpal tunnel syndrome is not related to his injury of July 31, 2008, or claimant's work activities with respondent after the accident;

2. claimant is not permanently and totally disabled;

3. claimant suffers a 100 percent wage loss and a 47 percent task loss, resulting in a 73.5 percent work disability; and

4. claimant reached maximum medical improvement on August 3, 2010.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 17, 2012, is modified to reflect a work disability of 73.5 percent.

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[11] 2 Modern Workers Compensation § 200:28.

[12] *Rose v. Thornton & Florence Electric Co.*, 4 Kan. App. 2d 669, 672, 609 P.2d 1180, *rev. denied* 228 Kan. 807 (1980).

[13] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

The Board has recalculated the permanent partial disability and finds that claimant is entitled to 123.42 weeks of temporary total disability compensation at the rate of $378.44 per week or $46,707.06, followed by 22.99 weeks of permanent partial disability compensation at the rate of $378.44 per week or $8,700.34 for a 7.5 percent functional disability, followed by permanent partial disability compensation at the rate of $378.44 per week not to exceed $100,000 for a 73.5 percent work disability.

As of February 5, 2013, there would be due and owing to the claimant 123.42 weeks of temporary total disability compensation at the rate of $378.44 per week in the sum of $46,707.06 plus 112.29 weeks of permanent partial disability compensation at the rate of $378.44 per week in the sum of $42,495.03 for a total due and owing of $89,202.09, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $10,797.91 shall be paid at the rate of $378.44 per week until fully paid or until further order from the Director, less the amount of $10,271.40 found to be an overpayment of temporary total disability compensation. Credit for the overpayment shall be first applied to the final week of permanent partial disability and then to each preceding week until the credit is exhausted.[14]

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

[14] K.S.A. 2011 Supp 44-525(c).

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Rebecca A. Sanders, Administrative Law Judge